No. 01-679

MAR 27 2002

IN THE

Supreme Court of the United States

OCTOBER TERM, 2001

GONZAGA UNIVERSITY and ROBERTA S. LEAGUE,

Petitioners,

—v.—

JOHN DOE,

Respondent.

ON WRIT OF *CERTIORARI* TO
THE WASHINGTON SUPREME COURT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF WASHINGTON, IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to preserving and protecting the principles of liberty embodied in our nation's Constitution and laws. The ACLU of Washington is one of its statewide affiliates. The Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. §1232g, involves two important statutory rights: access to governmental records and privacy protection against misuse of such records. When Congress enacted FERPA, it relied in part on information gathered by the New York Civil Liberties Union about the dangers of unregulated dissemination of education records. 120 Cong. Rec. 13951 (May 9, 1974)(statement of Sen. Buckley). The ACLU believes that FERPA, in conjunction with other laws like the Freedom of Information Act and the Privacy Act, strikes an appropriate balance between these two important interests, guaranteeing open access to documents that reveal how governmental officials are conducting the public's business, while also ensuring that personal information gathered under compulsion of governmental authority is not distributed at the expense of citizens' privacy. Over the years, ACLU affiliates have counseled many families and school districts regarding their rights and obligations under FERPA. The proper resolution of this case is therefore a matter of significant concern to the ACLU and its members throughout the country.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

Unbeknownst to respondent John Doe, petitioner Gonzaga University relied on misinterpretations of hearsay to fill Doe's education records with inaccurate speculations that Doe had engaged in sexual misconduct and then damaged Doe's employment prospects through its longstanding pattern and practice of revealing this damaging (mis)information to third parties without Doe's consent. This is precisely the sort of harm that Congress sought to eliminate by enacting FERPA:

> When parents and students are not allowed to inspect school records and make corrections, numerous erroneous and harmful material [sic] can creep into the records. Such inaccurate materials can have devastatingly negative effects on the academic future and job prospects of an innocent, unaware student.

120 Cong. Rec. 14580 (May 14, 1974)(statement of Sen. Buckley). To prevent injuries like these, FERPA mandates that educational institutions receiving federal funds may not reveal information contained in education records unless consent is given by an adult student, 20 U.S.C. §1232g(d), or a parent of a minor student, 20 U.S.C. §1232g(b)(1), or the disclosure falls within a set of statutory exceptions.[2] The parties presented conflicting testimony at trial as to Doe's alleged misconduct and Gonzaga's methods of investigating it, but the jury -- having had the opportunity to hear all of the testimony and judge the witnesses' credibility -- unanimously concluded that the accusations against Doe were false. There was no evidentiary dispute about Gonzaga's pattern or practice of disclosing information from education records without consent.

[2] Exemptions include, but are not limited to, disclosure within the school to persons with a legitimate educational interest in the information, §1232g(b)(1)(A), disclosure to necessary parties within the state's juvenile justice system, §1232g(b)(1)(E), disclosures necessary for accreditation or research purposes, §§1232g(b)(1)(F) & (G), or disclosures to federal agencies for purposes including educational oversight, §1232g(1)(C), and anti-terrorism investigations, §1232g(j)(1).

Viewing the evidence recounted by the Supreme Court of Washington in *Doe v. Gonzaga University*, 143 Wn.2d 687 (2001), in the light most favorable to the jury's verdict, the facts were as follows: John Doe was enrolled in the education program at Gonzaga University, with the goal of becoming an elementary school teacher. On the day he made his last tuition payment, Doe learned to his surprise that the Dean of Gonzaga's School of Education would not issue the affidavit of good moral character necessary for Doe to obtain a teaching certificate from Washington's Office of the Superintendent of Public Instruction (OSPI). The Dean's low opinion of Doe's morals was based on a collection of speculation and hearsay that Gonzaga recorded in Doe's education records, but never discussed with Doe himself. Gonzaga gathered this information after Defendant Roberta League, Gonzaga's teacher certification specialist, overheard a student telling a friend that she suspected John Doe had sex with his former girlfriend, Jane Doe, in a manner that caused Jane physical pain. League recognized John Doe's name as an education student, and decided that Gonzaga needed to investigate whether he had subjected Jane Doe to date rape or other sexual assault. League and other Gonzaga officials interviewed a number of people who recounted Jane Doe's statements to them about her relationship with Doe. They interviewed Jane Doe once, but she refused to make a statement. Based on these reports of what third parties told the Gonzaga officials that Jane Doe had told them -- but without ever asking John Doe for his version of events -- the Dean decided that she could not certify John Doe's good moral character. Gonzaga did not

limit itself to withholding the certificate; it also informed state agencies about the substance of its investigation.

John Doe sued. Jane Doe testified that John Doe never sexually assaulted her, that she never made many of the statements attributed to her by Gonzaga officials, and that the remaining statements were misinterpreted or blown out of proportion. John Doe and others presented evidence of his good moral character, while other witnesses testified that their statements to Gonzaga officials had been misreported. As reflected by the verdict, the jury believed Doe's version of events. It awarded him over $700,000 in damages on his state law claims for defamation, breach of contract, negligence, and invasion of privacy, and awarded him $150,000 in damages plus $300,000 in punitive damages for Gonzaga's unauthorized disclosure of information from his education records pursuant to a policy or practice in violation of FERPA.

The evidence of the FERPA violation was uncontradicted. Although teacher certification requires an affidavit from the dean regarding the teacher candidate's fitness, Gonzaga went far beyond simply providing or not providing the affidavit as required by state law. Gonzaga personnel routinely called employees at OSPI to reveal information about students for whom they had developed "cause for concern." 143 Wn.2d at 707. During these calls, Gonzaga routinely disclosed information contained in students' education records without consent and regardless of whether it fell within a statutory exemption. Doe's case typified this pattern: Gonzaga began disclosing information about Doe to OSPI before he ever applied for a teaching certificate. There were "numerous" telephone disclosures identifying Doe by name and describing the progress of the investigation. 143 Wn.2d at 695. The first of these calls occurred after Gonzaga had interviewed only one witness, thus increasing the likelihood that incomplete or misleading information would be transmitted. Gonzaga did not argue that these disclosures to OSPI fell within a statutory exemption from the consent requirement, and no evidence was offered to suggest that any exemption applied.

The Supreme Court of Washington affirmed the judgment in most respects. On the federal claim, it agreed with the overwhelming majority of courts in finding that Doe could use 42 U.S.C. §1983 to vindicate student privacy rights under FERPA. It also found sufficient evidence to support the jury's finding that Gonzaga had violated the statute and merited punitive damages. This Court granted *certiorari* to determine whether FERPA could be enforced through §1983, but declined to review Gonzaga's argument that it did not act under color of state law.

SUMMARY OF ARGUMENT

Amici agree with the overwhelming majority of courts that have examined the text, structure, and history of FERPA to conclude that it may be judicially enforced through 42 U.S.C. §1983. The line of cases running from *Maine v. Thiboutot*, 448 U.S. 1 (1980), through *Blessing v. Freestone*, 520 U.S. 329 (1997), establishes the test for determining whether a statute creates a "federal right" under §1983. FERPA undoubtedly satisfies this test. The statute is clearly intended to benefit students and their families by giving them individually exercisable veto power over disclosure of education records maintained by federally funded educational institutions. The right of confidentiality is expressed in concrete terms that are not so vague and amorphous as to strain judicial competence. The obligation to maintain confidentiality is mandatory, not optional. And nothing in the statute specifically forecloses a §1983 remedy or otherwise rebuts the presumption of private enforcement. Rather than repeat the detailed analysis of the *Blessing* test

in Doe's brief, this *amicus* brief explains why the privacy of education records is so important, why a private cause of action is fully consistent with Congress's goals in enacting FERPA, and why the petitioners' dire warnings about adverse consequences of the majority rule are unfounded.

Education records contain a vast storehouse of intimate information about students, which includes not only their grades, but also observations about their personalities, their medical and psychiatric histories, and their family circumstances. Because attendance by students is compulsory, schools acting *in loco parentis* are in a position to have more information about students than anyone other than parents themselves. In enacting FERPA, Congress was outraged by incidents where intimate family information was misused to the detriment of students' future education and job prospects. Congress considered such conduct to be wrongful, and it intended for FERPA to eradicate these practices. Congress viewed individual control over personally identifiable information in education records as a civil right, crucial to individual and family autonomy against the power of state institutions.

The civil rights created by FERPA cannot be fully protected without a private cause of action. Agency enforcement is beneficial on a systemic level, but it cannot provide two things that affected families need most: immediate injunctive relief (to gain access to wrongfully withheld records or to prevent imminent threats of unauthorized disclosures) and compensation for past violations. Private actions for declaratory, injunctive, or compensatory relief form a natural complement to agency enforcement. Unlike denial of federal funding, which is a harsh and inflexible remedy that would be crippling to an educational institution, private damages actions are more closely tailored to specific violations and give additional credibility to the Department of Education's (DOE) enforcement activities. The prospect of

inconsistent interpretations of FERPA by courts hearing §1983 actions is historically unfounded.

The dire consequences predicted by petitioners are not a valid basis for altering this Court's customary test for assessing statutes creating federal rights. There will be no flood of FERPA litigation if this Court upholds the majority rule. Decades of experience with the statute have resulted in very little FERPA litigation. What litigation there has been has resulted mainly in declaratory and injunctive relief only. Furthermore, the structure of the statute precludes claims over single instances of wrongful disclosure. FERPA actually rescues educational institutions from the tug of war between families seeking privacy and media outlets seeking disclosure. There is no reason to fear that §1983 enforcement of FERPA will somehow turn sunshine laws into confidentiality statutes.

ARGUMENT

I. Congress Correctly Recognized The Strong Individual Interest Of Students And Their Families In Protecting The Privacy Of Education Records

A. Educational Institutions Compel Families to Disclose Intimate Personal Information That Could Cause Serious Harm If Misused

Through compulsory education laws, the states require that children spend a large portion of their waking hours in educational institutions under the close watch of school officials. Next to the family itself, school staff are in the best position to gather personal information about students and record it in permanent or semi-permanent records that accompany students through the educational process. Education records contain more than just grades and records of attendance. They can contain teachers' observations about

students' personalities and learning styles; assessments of their social relationships with other students; health and medication history; information about the student's family; instances of school discipline, whether for minor infractions like talking in class to major infractions like fighting or possession of contraband; counseling records; sexual history information; or anything else that a school chooses to record.

The volume and the intimacy of the information maintained by schools makes it critically important that families have control over how a school records and disseminates the personal information of individual students. Congress adopted FERPA because it disapproved of invasions of privacy perpetrated by school officials, such as:

- A secretary for a community tutoring project called a school to confirm which grade a student was enrolled in. During the call, the principal gratuitously read from education records indicating that the student was a bed-wetter and his mother was an alcoholic with different boyfriends visiting the house each night. 120 Cong. Rec. 13953 (May 9, 1974).

- A student was forbidden from attending her own junior high graduation because the school considered her a "bad citizen." The school refused to divulge the alleged evidence of "poor citizenship" to the parents. 120 Cong. Rec. 14580 (May 14, 1974).

- Some families learned that schools kept records of political involvement that could be constitutionally protected against mandatory disclosure under *Bates v City of Little Rock*, 361 U.S. 516, 524 (1960), and *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 461 (1958). An African-American father discovered that his daughter's education records contained five pages of detailed notes about his "political activity." A student who criticized his school's administration found the notation "radical tendencies" placed in his school record. 120 Cong. Rec. 13953-54 (May 9, 1974).

Concerned that "trivial or erroneous material kept in such files can harm and haunt individuals throughout their lives" when it is disclosed to others, 120 Cong. Rec. 13951 (May 9, 1974), Congress enacted FERPA "to assure parents of students, and students themselves if they are over the age of 18 or attending an institution of postsecondary education, access to their education records and to protect such individuals' rights to privacy by limiting the transferability of their records without their consent." 120 Cong. Rec. 39862 (Dec. 13, 1974)("Joint Statement in Explanation of the Buckley/Pell Amendment"). Recent FERPA cases demonstrate how the potential for individual harm from lack of access to, or unauthorized disclosure of, education records persists to this day.

- A public university in New Jersey routinely distributed class rosters containing students' social security numbers. *Krebs v. Rutgers*, 797 F.Supp. 1246 (D.N.J. 1992).

- An attorney for a New Hampshire school district obtained copies of a student's juvenile court records for use in evaluating his individual education plan. Although the student's mother needed these records to advocate effectively for her son's educational needs, the district refused to release

them to her. *Belanger v. Nashua, New Hampshire, School District*, 856 F.Supp. 40 (D.N.H. 1994).

- A Kentucky school released information to a newspaper reporter that allowed the paper to describe "a 12-year-old female with severe emotional and behavioral problems, resulting primarily from a medical condition, hermaphroditism." *Doe v. Knox County Board of Education*, 918 F.Supp. 181, 183 (E.D. Ky. 1996)(remanding for trial to determine if the unauthorized disclosure involved personally identifiable information).

- After a South Dakota school district endured significant expenses in accommodating the needs of a special education student, it released information identifying the student's family. The student was identified by name and by photograph in the local media, which led to harassing phone calls and attempts to force the family to move. *Maynard v. Greater Hoyt School District No. 61.4*, 876 F.Supp. 1104 (D.S.D. 1995).

- An Ohio school district sold personal information about its students to a bank for use in a direct-mail marketing campaign to recruit customers for "Small Savers Prestige Accounts." As part of the transaction, the school released names, ages, grade levels, home addresses, and, in some instances, social security numbers of their students. *Connors v. Board of Education of the Indian Creek Local Sch. Dist.*, No. C-2-00-0990 (S.D. Ohio 2000).

The hazards of unauthorized disclosure of education records will, if anything, grow more serious as a result of recent developments causing ever more personal information being demanded and included in education records. In response to concerns over school violence, for example, some schools require perceived "problem students" to undergo psychiatric evaluations, the results of which become part of the students' files. *LaVine v. Blaine School District*, 257 F.3d 981 (9th Cir. 2000), *reh'g denied*, 2002 WL 109285 (Jan. 29, 2002); *Boman v. Bluestem Unified Sch. Dist.*, 2000 WL 297167 (D. Kan. Jan. 28, 2000). Schools conducting drug testing of students may keep records of test results. *Earls v. Tecumsah Public Sch. Dist.*, 242 F.3d 1264, 1268 (10th Cir. 2001), *cert. granted*, __ U.S. __, 122 S.Ct. 509 (2001). The No Child Left Behind Act of 2001, P.L. 107-110, 115 Stat. 1425 (2002), mandates increased reliance on standardized testing and other outcome-based assessments of education that must be recorded. And the increasing use of public/private partnerships as a method of education funding increases the pressure for schools to gather and release information for marketing purposes.

B. Congress Viewed Educational Privacy As An Individual Civil Right

The legislative history of FERPA provides ample evidence that Congress was concerned with the impact of the improper release of education records on individual students and their families. Senator Buckley, the Act's chief sponsor, likened FERPA to other judicially enforceable statutes such as the federal Privacy Act, 5 U.S.C. §552a(g)(1), the Freedom of Information Act, 5 U.S.C. §552(4)(B), and the

Fair Credit Reporting Act, 15 U.S.C. §§1681n-1681p. *See* 120 Cong. Rec. 13951-52 (May 9, 1974), 121 Cong. Rec. 13991 (May 13, 1975). These acts create an individual entitlement to some measure of personal control over information held by others. Congress enacted FERPA in precisely the same spirit.

> The public has also become aware of the *genuine danger to the privacy and civil liberties of all Americans* posed by the growth of such secret files and computer banks. Several bills have been introduced in Congress to attempt to deal with this problem, and I am pleased to be a cosponsor of one of the most significant ones, S. 2883, the Fair Credit Reporting Act of 1974.
>
> [I]n spite of this evidence of increased awareness and concern over these dangers, hardly any public outcry has been heard about the *systematic violation of privacy and personal rights*, through the existence of secret files, of two of the largest classes of Americans.
>
> I speak of the *right of privacy of millions of children* in the schools across our nation whose school records are routinely made available to governmental and other busybodies, *and the rights of their parents*, who are too often denied access to such information.

120 Cong. Rec. 13951 (May 9, 1974)(statement of Sen. Buckley)(emphasis added). On several occasions, Senator Buckley explained that FERPA was intended to be a civil rights law.

> Let me note that programs of Federal aid to the States and localities have almost always required that the recipients meet certain conditions -- the area of civil rights and nondiscrimination being one of the most prominent examples -- in order to be eligible for assistance. *My amendment serves to make the protection of civil rights more comprehensive.*

120 Cong. Rec. 13952 (May 9, 1974)(emphasis added). *See also id.* (law should act as a "personal shield for every American"); *id.* at 14581 (May 14, 1974)("My amendment broadens the protection of civil rights to include the civil rights of parents and students vis-à-vis the schools" and is concerned with "the personal rights of America's children and their parents").

Senator Buckley's understanding was shared by other supporters of the bill. Senator Cranston offered to "wholeheartedly support" the privacy protections of FERPA, noting that they "preserve a *right to confidentiality* of records of student academic and personal performance that should be guaranteed." 120 Cong. Rec. 14594 (May 14, 1974)(emphasis added). Senator Ervin noted that privacy of public school pupils "is a problem that has long been with us. The time has come to do something about it." 120 Cong. Rec. 14584 (May 14, 1974). Senator Biden also thought educational privacy protections were "long overdue." *Id.* The latter statements reveal an important truth about the statute: Congress would not have enacted FERPA if it believed existing state law tort remedies were adequate to ensure educational privacy. Senator Buckley likened existing remedies to thin "veils" that were insufficient to protect the rights of students and parents.

More fundamentally, my initiation of this legislation rests on my belief that the protection of individual privacy is essential to the continued existence of a free society. *There has been clear evidence of frequent, even systematic violations of the privacy of students and parents* by the schools through the unauthorized collection of sensitive personal information and the unauthorized, inappropriate release of personal data to various individuals and organizations. In addition, the growth of the use of computer data banks on students and individuals in general has threatened to tear away most of *the remaining veils guarding personal privacy*, and to place enormous, dangerous power in the hands of the government, as well as private organizations.

121 Cong. Rec. 13991 (May 13, 1975)(emphasis added). Because Congress specifically designed FERPA to eradicate existing institutional practices it considered wrongful, tort liability for wrongdoers under §1983 is entirely consistent with Congress's intent.

Indeed, Congress believed that opportunities for judicial interpretation of FERPA were both inevitable and beneficial.

> All this is not to suggest that there are no problems and uncertainties involved in the implementation of the Buckley amendment. But it must be realized that such problems and questions arise before, during, and after the implementation of nearly every law. *That is one of the reasons we have courts*, where considerations of the intent of legislation, the test of reasonableness and of equity usually

> combine to produce proper and appropriate applications of the law.

120 Cong. Rec. 36532 (Nov. 19, 1974)(emphasis added).

Congress recognized that invasion of privacy through education records was for the most part a problem created by the government. Almost all of the schools in the nation receiving federal funds are public schools. 34 Indiv. with Disabilities Educ. Law Rep. 151 (Oct. 4, 2000)(DOE Letter to Representative Bob Schaffer). The proportion is even higher in the primary schools. *Id.* Senator Buckley noted that control over education records is intertwined with control over child-rearing itself, an area of intimate personal decision-making that should rest with individual parents, not the state.

> The sense of a loss of control over one's life and destiny . . . seems to be increasingly felt by parents with respect to the upbringing of their own children. Such elitist and paternalistic attitudes [of educators] reflect the widening efforts of some, both in and out of Government, *to diminish the rights and responsibilities of parents for the upbringing of their children, and to transfer such rights and functions to the State* -- to separate, figuratively, and in some cases, literally, the child from his parents, and to turn him over to the care of the State, as represented by schools and other arms of its administration.

120 Cong. Rec. 14580 (May 14, 1974)(emphasis added). In this way, FERPA reflects an abiding constitutional value: that child-rearing decisions are to be made first and foremost within the family, even where society has a strong in-

terest in requiring a minimum level of formal education. *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). *See also* Brief of *Amicus* Capitol Resource Institute in *Owasso Sch. Dist. v. Falvo*, 2001 WL 1222398 (2001). Because educational privacy is a problem chiefly created by government, and because the violation of educational privacy can and often does involve important constitutional rights, it was appropriate for Congress to construct an education privacy statute that could be enforced through §1983. The overwhelming majority of courts considering the question have held that FERPA can be so enforced.[3]

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[3] *See Falvo v. Owasso Ind. Sch. Dist. No. I-011*, 233 F.3d 1203 (10th Cir. 2000), *rev'd on other grounds*, __ U.S. __, 122 S.Ct. 934 (2002), *Achman v. Chisago Lakes Indep. Sch. Dist. No. 2144*, 45 F.Supp. 2d 664 (D. Minn. 1999); *Brown v. City of Oneonta*, 106 F.3d 1125 (2d Cir. 1997), *cert. denied*, __ U.S. __, 122 S.Ct. 44 (2000); *Cullens v. Bemis*, 979 F.2d 850 (table),1992 WL 337688 (6th Cir. Nov. 18, 1992); *Tarka v. Cunningham*, 917 F.2d 890 (5th Cir. 1990); *Fay v. South Colonie Cent. Sch. Dist.*, 802 F.2d 21 (2d Cir. 1986); *Goodreau v. Rector and Visitors of the Univ. of Virginia*, 116 F.Supp.2d 694 (W.D. Va. 2000); *Doe v. Knox County Bd. of Educ.*, 918 F.Supp. 181 (E.D. Ky. 1996); *Lewin v. Med. Coll. of Hampton Roads*, 931 F.Supp. 443 (E.D. Va. 1996), *aff'd*, 131 F.3d 135 (4th Cir. 1997); *Maynard v. Greater Hoyt Sch. Dist. No. 61-4*, 876 F.Supp. 1104 (D.S.D. 1995); *Belanger v. Nashua, N.H., Sch. Dist.*, 856 F.Supp. 40 (D.N.H. 1994); *Krebs v. Rutgers University*, 797 F.Supp. 1246 (D.N.J. 1992); *Francois v. University of the Dist. of Columbia*, 788 F.Supp. 31 (D.D.C. 1992); *Norwood v. Slammons*, 788 F.Supp. 1020 (W.D. Ark. 1991). Only two federal district courts have declined to recognize a §1983 cause of action to enforce FERPA. *Gundlach v. Reinstein*, 924 F.Supp. 684 (E.D. Penn. 1996), *aff'd without opinion*, 114 F.3d 1172 (3d Cir. 1997)(table); *Norris v. Board of Ed. of Greenwood Community Sch. Corp.*, 797 F.Supp. 1452 (S.D. Ind. 1992).

C. The Individual Privacy Rights That Congress Codified in FERPA Cannot Be Fully Protected Without A Private Cause of Action

1. Agency Enforcement Cannot Provide Immediate Injunctive Relief or Compensation for Past Injuries

The Department of Education's Family Privacy Compliance Office (FPCO) performs a valuable function in monitoring and encouraging compliance with FERPA. Its general *enforcement* powers, however, do not include *remedial* relief to individuals whose rights are violated by a federally funded educational institution. This Court has "stressed that a plaintiff's ability to invoke §1983 cannot be defeated simply by '[t]he availability of administrative mechanisms to protect the plaintiff's interests.'" *Blessing*, 520 U.S. at 347 (citation omitted). The lack of agency tools for individual relief under FERPA contrasts sharply with the detailed remedial schemes found in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, 453 U.S. 1, 20 (1981)(statute had separate provisions for citizen suits), and *Smith v. Robinson*, 468 U.S. 992 (1984)(statute expressly provided for judicial review of agency adjudications).

Most FERPA litigation has sought injunctive and declaratory relief only. Families facing ongoing or imminent violations -- like the New Hampshire mother who needed immediate access to her son's records in *Belanger*, or the New Jersey students whose social security numbers were to be distributed in *Krebs* -- cannot secure any relief through the administrative process with the timeliness or effect of an injunction. The process is simply too prolonged to respond effectively to a dynamic situation. Under FPCO's regulations, a written complaint initiates an investigation, which, if

substantiated, is followed by a notice of violation, after which the offending institution is afforded "a reasonable period of time" to comply voluntarily with its FERPA obligations. *See* 34 C.F.R. §99.64. Only if FPCO cannot obtain voluntary compliance will it initiate any formal proceedings to compel compliance. *See* 34 C.F.R. §§81.3, 99.67. Even an agency cease and desist order (if one is issued) cannot be enforced through the contempt power as an injunction would. Cease and desist orders under FERPA are not self-executing, and can be enforced only by cutting off federal funds or by referring the matter to the Attorney General, both of which would require additional procedures after the initial entry of the agency's order. 20 U.S.C. §1234e. *See United States v. Miami Univ.*, 91 F.Supp.2d 1132, 1159 (S.D. Ohio 2000)("Absent additional enforcement measures, a cease and desist order under §1234e merely serves as notice to the fund recipient that the Department considers the recipient's actions to be in violation of FERPA"). By the time all of these administrative hurdles have been cleared, it is likely that damage sought to be avoided will have already occurred. This unfortunate result is even more likely because FPCO is a small agency -- in 2000 it consisted of seven staff members -- that has experienced frequent backlogs in responding to complaints. *See* 34 Indiv. with Disabilities Educ. Law Rep. 151 (Oct. 4, 2000)(DOE Letter to Representative Bob Schaffer); South Glens Falls (N.Y.) Cent. Sch. Dist., 32 Indiv. with Disabilities Educ. Law Rep. 100 (July 21, 1999)(FPCO letter apologizing for delayed response to parent's complaint and attributing the backlog to the "large amount of incoming correspondence [the] Office receives."); Fonda-Fultonville (N.Y.) Cent. Sch. Dist., 31 Indiv. with Disabilities Educ. Law Rep. 149 (April 17, 1998)(same).

Even if FPCO enforcement were an adequate substitute for injunctive relief, it could never provide compensation for

past injuries caused by unlawful policies or practices. The only possible result of the administrative procedure is an agreement by an educational institution to change those policies or practices in the future to avoid new harms. This form of enforcement does not "necessarily respond to the harm suffered by aggrieved individuals." *Krebs*, 797 F.Supp. at 1258. The *Gonzaga* case is atypical of FERPA damages actions in many ways. First, it is the only FERPA case ever to award substantial damages. Second, Gonzaga's FERPA violation was accompanied by actionable defamation, because the information disseminated from Doe's education records was determined to be false. Most FERPA plaintiffs will face dissemination of truthful information, like the New Jersey students in *Krebs* whose social security numbers were shown to other students, or the Ohio families in *Connors* whose personal information was sold to a private business for marketing purposes. These plaintiffs will have a harder time meeting the high burdens of common law invasion of privacy through publication of private facts. Restatement (Second) of Torts §652D (disclosure must be "highly" offensive to a reasonable person and not of legitimate concern to the public). If damage suits are filed at all under state law theories for cases like these, the damages would likely be too small to attract qualified counsel on a contingent fee basis.[4]

2. Withholding Of Federal Funds Is A Far Harsher Remedy Than Tort Liability And Is Not A Realistic Deterrent

Termination of federal funding is an inflexible and harsh remedy. As a result, "the Secretary cannot be expected to threaten and/or act upon this drastic remedy for

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[4] Enforcement of FERPA through §1983 allows the prevailing parties to receive attorneys' fees under 42 U.S.C. §1988.

each and every minor FERPA violation." *Krebs*, 797 F.Supp. at 1257. Even in instances where DOE has found that a FERPA violation occurred, it has not taken steps to deny the offending institution federal funds. *See Maynard*, 876 F.Supp. at 1107. The reluctance to deny funding is perfectly understandable, since loss of funds could "exacerbate [a] community's financial burden in providing the 'free, appropriate, public education' required by other federal statutes." *Id.*

> Such a harsh remedy would serve as a significant financial blow to universities and other institutions, and potentially could cause a decrease in the level of education. In the long-run, the students attending these institutions and their parents -- the parties whom FERPA was intended to protect -- would be the ones most penalized by such action. Therefore, except in the most egregious cases, termination of federal funding would actually stymie the purposes of FERPA, rather than advance them.

Miami Univ., 91 F.Supp.2d at 1140. As a result, DOE has not once in the nearly thirty years since Congress enacted FERPA withheld or terminated funding for a violation of FERPA.

The present case, although it represents the only significant damages award under FERPA, demonstrates how §1983 liability is less severe to an institution than termination of federal funds. In the case at hand, the jury made a very rare damage award of $150,000 in damages for the FERPA violation, and a still rarer award of $300,000 in punitive damages. If DOE had exercised its authority to withdraw Gonzaga's federal funding, the school stood to lose between $23

and $30 million in annual federal assistance. Respondent's Brief in Opposition to Petition for Writ of *Certiorari* at 11 n.4.

The availability of a private judicial remedy is likely to make FPCO's job easier. Under agency enforcement regulations, it is very difficult for the agency persuasively to speak softly and carry a big stick: the stick is so big that all involved in the negotiations know it will not be wielded. Private enforcement allows FPCO to point to the less expensive, but more realistic possibility of a §1983 action from injured parties if the educational institution does not change its offending policies and practices. In addition to being a more credible deterrent, the possibility of private enforcement lets FPCO enter negotiations with the *persona* of a friendly partner in education seeking to help the funding recipient avoid trouble from others, rather than as a bully relying on the threat of an excessive and disproportionate penalty.

3. Conflicting Court Interpretations Of FERPA Are Unlikely

Unlike the vague terms of the statute in *Suter v. Artist M.*, 503 U.S. 347 (1992), that called for funding recipients to undertake "reasonable efforts" towards "substantial compliance," FERPA is a concrete and eminently intelligible statute. Students and families must be allowed to see their education records except for certain statutorily defined exceptions, and schools must keep education records confidential unless the family consents or the disclosure falls within a statutorily defined exception. Whatever room remains for disagreement on details may be resolved through deference to reasonable agency regulations under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). Nothing in FERPA is so "vague and amorphous" that enforcement

would strain judicial competence. *Blessing*, 520 U.S. at 340.

There is little basis to Gonzaga's assertion that "FERPA has given rise to an extraordinary volume and startling variety of interpretations by students and parents" and that FERPA can arise every day "in a bewildering array of unanticipated circumstances." Petitioners' Brief at 26-27. To the contrary, the relatively small amount of FERPA litigation shows that courts are quite capable of correctly interpreting and applying the Act. The only issue to be the subject of any serious difference of judicial opinion has been the definition of "education records," and that was recently resolved in *Owasso School District v. Falvo*, __U.S. __, 122 S.Ct. 934 (2002), through the ordinary and nondramatic application of this Court's final authority over legislative interpretation. For every other issue that has arisen under the statute, the federal courts have been in near-total harmony. They have uniformly found that one-time violations of the confidentiality subsection do not constitute a "policy or practice" of unauthorized disclosures.[5] They have uniformly rejected attempts to use FERPA as a lever to change the substance of a school's educational programs.[6] They have agreed that a plaintiff must be a student or parent to fall within the class of persons for whose benefit FERPA was created.[7] Finally, the federal courts have uniformly agreed

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[5] *See, e.g., Achman*, 45 F.Supp. 2d 664; *Gundlach*, 924 F.Supp. 684; *Maynard*, 876 F.Supp. 1104; *Francois*, 788 F.Supp. 31.

[6] *Owasso School District v. Falvo*, __ U.S. __, 122 S.Ct. 934 (2002) (rejecting use of FERPA to challenge practice of students grading each others' papers); *Lewin*, 931 F.Supp. 443 (rejecting use of FERPA to challenge grades); *Tarka v. Cunningham*, 917 F.2d 890 (same).

[7] *Klein Indep. Sch. Dist. v. Mattox*, 830 F.2d 576 (5th Cir. 1987)(FERPA does not prevent release of teacher's personnel file); (continued...)

that FERPA does not contain an implied right of action under *Cort v. Ash*, 422 U.S. 66 (1975),[8] and with almost no exceptions they have also held that FERPA does create federal rights enforceable through §1983.[9]

D. Affirming the Majority Rule Will Not Result In the Dangers Asserted By Gonzaga and its *Amici*

1. There Has Not Been, And There Will Not Be, A Flood Of FERPA Damages Litigation Against School Districts Under §1983

Gonzaga and its *amici* forecast a torrent of damages litigation against educational institutions receiving federal funds. As explained below, the fear is simply not justified as a factual matter. Even if it were, the prospects of future litigation is no reason to disregard Congress's expressed intent. Just this Term in *Swierkiewicz v. Sorema, N.A.*, __ U.S. __, __, 122 S.Ct. 992, 999 (2002), this Court unanimously rejected the argument that the unsubstantiated risk of frivolous future lawsuits could justify an unwritten exception to the governing statute or rule.

Fortunately, the Court does not need to speculate about the effect of allowing plaintiffs to enforce FERPA through §1983. The vast majority of lower courts addressing the issue have authorized FERPA suits since the mid-1980's,

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[7] (...continued)
Norwood, 788 F.Supp. 1020 (prospective university student could not access education records pertaining to current students).

[8] *See, e.g., Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52 (1st Cir. 2002); *Tarka v. Franklin*, 891 F.2d 102 (5th Cir. 1989); *Fay*, 802 F.2d 21; *Girardier v. Webster Coll.*, 563 F.2d 1267 (8th Cir. 1977).

[9] *See* footnote 3 above.

generating a history that reveals several important patterns. First, there simply is not very much FERPA litigation. Considering that federal funds reach tens of thousands of school districts educating millions of students every year, the paucity of litigation is striking. Although it was enacted in 1974, there are only a few dozen reported cases involving individual claims under the statute, and this Court never had reason to examine FERPA until this Term. Second, only a portion of the FERPA litigation that has been brought under §1983 has sought damages, with most of it seeking only injunctive relief. Third, cases seeking damages have been overwhelmingly unsuccessful, either because the plaintiff fails on the merits or because the defendants have qualified immunity. Fourth, the damages that have been awarded are modest. To *amici*'s knowledge, the present case is the only FERPA case to ever result in an award of punitive damages. In the only other reported cases where damages were a possibility on remand, the courts indicated that damages, if any, were likely to be small or perhaps even nominal. *Fay*, 802 F.2d at 34, *Goodreau*, 116 F.Supp.2d at 708. Attorneys fees are also likely to be modest, since FERPA cases can frequently be resolved on summary judgment (the fact of disclosure without consent will typically be undisputed, and the applicability of statutory exemptions will be a question of law). *See, e.g.*, *Achman*, 45 F.Supp.2d at 674; *Lewin*, 931 F.Supp. at 443; *Maynard*, 876 F.Supp. at 1107-08; *Belanger*, 856 F.Supp. at 52. An atypical case like *Doe v. Gonzaga* cannot be the basis for judging the likely effects of continuing the majority rule.

There are a number of features within FERPA that ensure that litigation will rarely arise, and only then in situations involving serious violations of family privacy. To begin with, FERPA is easy to understand: it says to keep education records confidential unless the disclosure is permitted by a specific exemption. Most school districts have no difficulty understanding the obligation of confidentiality and obeying the congressional mandate. Interpretive guidance is also available from DOE. 34 C.F.R. Part 99. Another important check to FERPA litigation is the requirement that the educational institution have a "policy or practice" of unauthorized disclosure. FERPA's "policy or practice" language has prevented liability over single instances of wrongful disclosure, and it is likely to preclude *respondeat superior* liability in the absence of an institutional policy as well. Finally, FERPA has been around for decades. School administrators have had ample time to ensure that their record-keeping policies are in harmony with its confidentiality requirements. An educational institution persisting in policies of unauthorized disclosure that Congress sought to eliminate back in 1974 should not be viewed as a hapless victim of a newly imposed federal mandate. The defendants in any future FERPA litigation are likely to be those who simply flouted the law without any good faith claim to have been relying on a statutory exemption, as the jury concluded Gonzaga did in this case.

2. FERPA Frees Educational Institutions From Competing Demands Over Education Records

Amici American Association of Community Colleges, *et al.* (AACC), argue that judicial enforcement of FERPA will place educational institutions in a tug of war between media outlets seeking release of information and families seeking to keep it confidential. AACC Brief at 12-14. The concern is misplaced. By establishing a clear baseline rule of confidentiality and a set of narrow enumerated exemptions, FERPA actually frees educational institutions from the tug of war. The institution simply informs the media outlet seeking access to protected education records that federal law prohibits their disclosure. The absence of a robustly en-

forced FERPA would put educational institutions in a far more awkward situation than they currently face.

The two instances cited where universities were involved in litigation over disclosure of records did not involve enforcement of FERPA through §1983 in any event, so reversing the majority rule would be no guarantee against future disputes. The plaintiffs in *Student Press Law Center v. Alexander*, 778 F.Supp. 1227 (D.D.C. 1991), argued unsuccessfully in a §1983 action that FERPA's confidentiality provisions violated their constitutional rights. Congress later amended FERPA to give access to much of the campus crime information sought in that action. P.L. 102-325, 106 Stat. 448 (1992) §1555, and P.L. 105-244, 105-244 Stat. 1581 (1998) §951. The Miami University case arose under the Ohio Public Records Act, not §1983. *State ex rel. The Miami Student v. Miami Univ.*, 79 Ohio St.3d 168 (1997). It resulted in a second round of non-§1983 enforcement litigation by DOE only because the state court erred in its initial interpretation of FERPA (it had given an untenable construction to the statutory definition of "education record" and failed to afford *Chevron* deference to DOE's interpretations). *Miami Univ.*, 91 F.Supp.2d at 1149, 1152. While unpleasant for the universities involved, the successive rounds of litigation were an unavoidable byproduct of our nation's federal structure, combined with a single instance of judicial error that was later corrected. Neither situation provides a basis to eliminate individual redress for persons injured by FERPA violations.

3. The Concerns Of *Amici* Regarding Media Access To Student Records Are Misplaced

Amici Reporters Committee, *et al.*, worry that enforcing FERPA through §1983 will cause state agencies to withhold otherwise available government records out of fear that disclosure will lead to civil liability. As a strong proponent of public access to government records, the ACLU would likely join the Reporters Committee in a case presenting a serious danger of limiting access to records demonstrating how the government conducts public business. This is not such a case.

In essence, the Reporters Committee argument is directed against FERPA itself, rather than against judicial enforcement of it. A §1983 action under FERPA will only lie where a state agency has a policy or practice of releasing information that federal law deems confidential. It would neither expand nor contract the scope of information subject to mandatory disclosure or confidentiality. Actions under §1983 could not be used as a "reverse FOIA" through which sunshine laws would be converted into secrecy laws, because confidentiality may only be judicially enforced where the underlying statute actually mandates confidentiality. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 285 (1979)("FOIA is purely a disclosure statute and affords . . . no private right of action to enjoin agency disclosure").

The Reporters Committee acknowledges that the privacy of personal information held by government agencies is an appropriate subject for legislation. Reporters Committee Brief at 23-25. In practice, there are no serious conflicts between state public disclosure laws and FERPA, because many state laws already contain express protection for education records[10] or for information that must be kept confi-

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[10] *See, e.g.*: Alaska: Alaska Stat. §40.25.120(5); Arkansas: Ark. Code Ann. §25-19-195(b)(2); California: Cal. Educ. Code §49073 *et seq.*; Colorado: Colo. Rev. Stat. §24-72-204(3)(d)(III); Florida: Fla. Stat. §228.093(3)(d); Illinois: 5 Ill. Comp. Stat. 140/7(1)(a); Iowa: Iowa Code §22.7(1); Maryland: Md. Code Ann., State Gov't §10-616(k); Massachusetts: 63 Mass. Regs. Code §23.01 *et seq.*; Michigan: Mich. Comp. Laws §15.243(2); Minnesota: Minn. Stat. §13.32, Subd. 2(d); (continued...)

dential by operation of federal law.[11] The various amendments over the years to FERPA's list of statutory exemptions show that Congress has the same ability as state legislatures to revisit the scope of the statute as circumstances demand.[12] Indeed, Congress has agreed with the media that much college and university crime information should be available. FERPA's definition of confidential "education records" excludes "records maintained by a law enforcement unit of the educational agency or institution that were created by that law enforcement unit for the purpose of law enforcement." 20 U.S.C. §1232g(a)(4)(B)(2). In addition, the Student Right to Know Act requires all colleges and universities participating in federal student assistance programs to

[10] (...continued)
ST T. 51 §24A.16; Rhode Island: R.I. Gen. Laws §38-2-2(4)(i)(A); Tennessee: Tenn. Code Ann. §10-7-504(a)(4); Texas: Tex. Gov't Code Ann. §552.114(a); Vermont: Vt. Stat. Ann. tit. 1 §317(c)(11); Virginia: Va. Code Ann. §2.2-3705(A)(3); Washington: Wash. Rev. Code 42.17.310(1)(a); Wisconsin: Wis. Stat. §118.125(2); Wyoming: Wyo. Stat. Ann. §16-4-203(d)(viii).

[11] *See, e.g.*: Alabama: Ala. Code §36-12-40; Colorado: Colo. Rev. Stat. §24-72-204(1)(b); Delaware: Del. Code Ann. tit. 29, §10002(d)(6); District of Columbia: D.C. Code Ann. §2-534(a)(6); Idaho: Idaho Code §9-340A(1); Indiana: Ind. Code §5-14-3-4(a)(3); Kansas: Kan. Stat. Ann. §45-221(a)(1); Kentucky: Ky. Rev. Stat. Ann. §61.878(1)(k); Maine: Me. Rev. Stat. Ann. tit. 1, §402(3)(A); Mississippi: Miss. Code Ann. §25-61-11; New Hampshire: N.H. Rev. Stat. §91-A:4; New Mexico: N.M. Stat. Ann. §14-2-1(8); New York: N.Y. Pub. Off. Law §87(2)(a).

[12] Although Congress has frequently amended FERPA since its initial passage, it has never questioned the clear judicial consensus that FERPA can be enforced through §1983. *Cf. Edelman v. Lynchburg College*, No. 00-1072 (March 19, 2002), slip op. at 9 (Congress is presumed to have consented to agency regulation that it has not repudiated).

gather and disseminate campus crime statistics. 20 U.S.C. §1092(f).

In its quest to overturn Congress's legislative choice, the Reporters Committee suggests a novel gloss on §1983: namely, that the statute allows judicial enforcement only of those federal rights "secured by the Constitution and laws *other than laws involving privacy*." Reporters Committee Brief at 4 (emphasis added). Of course, no such limitation appears in the text of §1983, its history, or the cases interpreting it. The argument that §1983 should extend only to federal rights arising under traditional civil rights laws was rejected in *Maine v. Thiboutot*, 448 U.S. 1, and never embraced since. A privacy law that abridges First Amendment rights can of course be challenged constitutionally, either on its face or as applied. *E.g.*, *The Florida Star v. B. J. F.*, 491 U.S. 524 (1989). But, where Congress has enacted a constitutionally valid statute, there is no principled reason to treat statutory privacy rights as less deserving of judicial enforcement than other statutory rights.

CONCLUSION

For the reasons stated above, the judgment of the Washington Supreme Court should be affirmed.

Respectfully submitted,

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